

# DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548

FILE: B-219178.2

DATE: September 30, 1985

MATTER OF: Halifax Engineering, Inc.

## DIGEST:

1. In procurement for maintenance services for automated data processing equipment (ADPE), the contracting agency is under no obligation to equalize competitive advantage enjoyed by the original equipment manufacturer (OEM) by acquiring the necessary diagnostic software from the OEM and providing it without charge to the other offerors, since any advantage to the OEM is due solely to the fact that the government originally acquired its equipment and is not the result of any preferential treatment or other unfair action by the government.
2. Contracting agency's decision not to purchase diagnostic software as part of its procurement of ADPE is not objectionable absent showing by protester that agency's determination of its minimum needs is unreasonable.
3. Contracting agency's decision to pass along the cost of acquiring diagnostic software to offerors requesting that the government furnish the software is not inconsistent with Department of Defense guidelines on preventing fraud and enhancing competition, since the software is necessary to meet the agency's needs for maintenance of ADPE and there is no evidence that the agency is attempting unjustifiably to limit the procurement to a single source.
4. GAO will not review protester's allegation that OEM's practice of limiting the availability of its diagnostic software violates antitrust laws.

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Halifax Engineering, Inc., protests any award under request for proposals (RFP) No. N00014-85-R-0041, issued by the Navy for maintenance services for automated data processing equipment (ADPE) at the Naval Oceanographic Research and Development Activity's National Space Technology Labs. The protester contends that the government should agree to furnish to the successful offeror, without charge, the diagnostic software necessary to perform certain of the maintenance services. We deny the protest.

The RFP calls for maintenance services for ADPE originally acquired from Digital Equipment Corporation, including the DEC Vax series 11/750 and 11/780 models. Performing maintenance on the DEC Vax series 11/750 and 11/780 equipment requires the use of certain diagnostic software, and section 3.4.11 of the RFP as originally issued provided that offerors were responsible for furnishing the required software, either by acquiring it from Digital or developing it themselves.

Halifax challenged this provision in its initial protest to our Office, arguing that the government should furnish the necessary software to offerors other than Digital, the original equipment manufacturer. The Navy then amended section 3.4.11 of the RFP to provide that the software would be available to offerors through the government, but that an amount equal to the government's cost of acquiring the software (assumed to be \$35,500 for evaluation purposes) would be added to the prices proposed by offerors requesting the software from the government. The RFP continued to provide that offerors could make their own arrangements for acquiring the software instead of obtaining it through the government.

Halifax then renewed its protest, maintaining that the government should agree to provide the software without charge to offerors other than Digital. Halifax argues that Digital has a significant competitive advantage over other offerors since, as the original equipment manufacturer, it already has developed the necessary diagnostic software. According to Halifax, all other offerors are forced to obtain the software through the government, since Digital will make its software available only to owners of its equipment, and the cost of independently developing appropriate software is prohibitive. Halifax also argues that the software should have been acquired as part of the original procurement of equipment, and that the Navy's decision not to furnish the software is inconsistent with Department of Defense (DOD) policies to

reduce fraud and enhance competition since Digital effectively is the sole source for the software.

The protester does not contend that the RFP requirement for diagnostic software is unduly restrictive; on the contrary, Halifax concedes that the software is essential to the Navy's needs. Rather, Halifax's complaint concerns which party should bear the cost of acquiring the software. Halifax argues that the government should purchase and furnish the software without charge, on the theory that Digital otherwise would enjoy an unfair competitive advantage over other offerors since only Digital already possesses the software. In essence, Halifax maintains that the government should equalize Digital's competitive advantage by absorbing the cost of acquiring the software itself.

We disagree. The government may be required to equalize a competitive advantage enjoyed by an offeror only where the advantage results from preferential treatment of that offeror or other unfair action by the government. See, e.g., B.B. Saxon Co., 57 Comp. Gen. 501 (1978), 78-1 CPD ¶ 410. Here, any advantage to Digital arises simply because the government originally acquired equipment manufactured by Digital, for which Digital already has developed the diagnostic software. In our view, Digital's advantage is similar to that enjoyed by an incumbent contractor as a result of its existing contract, an advantage for which the government is not required to compensate. Avitech Inc., B-214670, July 30, 1984, 84-2 CPD ¶ 125; Universal Alarm Services, B-214022, Mar. 5, 1984, 84-1 CPD ¶ 267. As a result, we see no basis on which to object to the Navy's decision to require offerors to obtain or develop the software at their own expense or to pass along the cost of acquiring the software to any offeror which requests that the government furnish it.

We regard Halifax's additional argument, that the diagnostic software should have been acquired along with the equipment, as in essence a restatement of its primary contention that the government should bear the cost of furnishing the software. However, to the extent that Halifax also is questioning the Navy's underlying determination that it need not acquire the software itself--either as part of the original equipment procurement or in connection with the present procurement for maintenance services--Halifax's argument relates to the Navy's determination of its minimum needs, a determination which we will not question absent a clear showing that it is unreasonable. See Sentinel Electronics, Inc., B-212770, Dec. 20, 1983, 84-1 CPD ¶ 5. Here, the only support the

protester offers for challenging the Navy's determination is its initial argument that the Navy was required to purchase the diagnostic software on its own behalf in order to equalize the competition. In view of our finding that the government was not obligated to neutralize Digital's competitive advantage by purchasing the software or otherwise, we see no basis on which to conclude that the Navy acted improperly by not purchasing the software along with the equipment.

The protester also argues that the Navy's decision not to absorb the cost of acquiring the software is contrary to DOD's guidelines for preventing procurement-related fraud, which caution the contracting agency against tailoring its requirements to a specific manufacturer's product or failing to develop alternate sources. Halifax presents no evidence, however, that the RFP requirement for diagnostic software is unjustifiably tailored to the software developed by Digital. The fact that only Digital has developed the required software does not make the software requirement unreasonable since, as Halifax agrees, that software is necessary to meet the Navy's needs for maintenance of the Digital equipment.

Finally, Halifax maintains that, by refusing to sell the software to anyone other than an owner of its equipment, Digital is engaging in violations of the antitrust laws. Halifax's complaint regarding the propriety of Digital's limitation on the availability of its products is a matter which we do not consider. Baltimore Electronics Associates, Inc., B-217499, Jan. 16, 1985, 85-1 CPD ¶ 46; C3, Inc., B-211900, Dec. 30, 1983, 84-1 CPD ¶ 44.

The protest is denied.

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